Supreme Court, U.S.
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No. 05-561

In The

Supreme Court of the United States

JOSEPH TOCCI,

Petitioner,

v.

FORT WAYNE – ALLEN COUNTY AIRPORT AUTHORITY, CITY OF FORT WAYNE and ALLEN COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Pro se

QUESTIONS PRESENTED FOR REVIEW

Under the United States Constitution, may a state constitutional challenge be denied a ruling:

1) on the basis of time constraints such as statutes of limitation or laches,

2) by operation of another statute, and

3) when doing so may perfect a statutory taking of real property.

Under the United States Constitution, may a state legislature move land title from one municipality to another without:

1) doing so explicitly,

2) the approval of the original municipality by conveyance of a deed, and

3) just compensation.

PARTIES TO THE PROCEEDING

The parties in the proceeding are:

Fort Wayne – Allen County Airport Authority, a municipal corporation.

City of Fort Wayne, a municipal corporation.

County of Allen, a municipal corporation.

SMDfund, a public interest advocacy for Smith Field Airport.

Joseph Tocci, Chairman of SMDfund.

Scott W. Noble, Treasurer of SMDfund.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Indiana Supreme Court filed on August 2, 2005 is reproduced in the Appendix at App. 1. The order and judgment of the Allen Circuit Court filed March 31, 2004, is reproduced in the Appendix at App. 14.

BASIS FOR SUPREME COURT JURISDICTION

The Indiana Supreme Court entered its judgment on August 2, 2005. Appendix A-1. Petitioner SMDfund, Inc. seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of a state supreme court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States:

Amendment I, Redress of Grievances Clause

Amendment XIV, Section 1, Privileges and Immunities, Due Process and Equal Protections Clauses.

Article IV, Section 4, Form of Government Clause

Constitution of Indiana:

Article I, Section 1, Reformation Clause, Section 23. Equal Protections Clause

Article IV, Section 23, Generalized Law Clause, Uniform Operation Clause

STATEMENT OF THE CASE

This case is not so much about the legal treatment delivered in our two-year judicial hide&seek game as much as it is about the scars gathered in the five-year siege saving an operating national historic airfield from demolition. It is not about persuading public officials to recognize value as much as it is about persuading ourselves that our local officials couldn't care less about our opinions and would never tell us the truth about what they value. It was about discovering that while in America, we can reform our government without spilling a lot of blood, someone is definitely going to spill a lot of money; and that a government tax subsidized budget crushes that of a grass roots public interest advocacy where the local newspaper is part of the WhatsInItForMe club.

Smith Field is the publicly owned general aviation (GA) airport in Fort Wayne, Indiana. It is the only public access GA airfield in Allen County. It consists of ~240 contiguous acres within the boundaries of Indiana's second largest city and within ½ mile of two interchanges to U.S. Interstate 69 and with prominent frontage on the most active retail development zone in the city. The airport was commissioned by the City of Fort Wayne in June 1925, five years before the explosive development of municipal airports, and was managed by the city's Aviation Commission under the direction of the mayor and subject to normal departmental oversight by the City Council. It is listed on the Indiana Registry of Historic Places and everything within the current fence line is listed in the United States Registry of Historic Places. Its operating subsidy represents less than 1% of Respondent's total budget of $20M, or $120,000 per annum.

It served as one of America's original airmail stops and the only civilian commercial airport in the region until 1946, when the City of Fort Wayne acquired the recently (1946) de-militarized Lt. Paul Baer Army Airfeld, moved scheduled airline service there and Smith Field stood down to general aviation. The big airport then received the full attention of the City's Aviation Commission and the Authority, while their maintenance of the little airport steadily declined until the filing of this lawsuit in 2003.

Smith Field survived at least three formal attempts by local government to close it – 1974, 1978 and 1990, before this one in 2002. They never succeeded until the last, when it was controlled by a sovereign board of appointed directors, or special district, rather than by the former city commission answerable to an elected mayor and nine city councilmen.

Fort Wayne-Allen County Airport Authority (*Respondent*, the Authority), a special district of Indiana government, was 'created' in 1985, over the protest of the predecessor City of Fort Wayne, by an act of the Indiana Legislature adding Section 1.1, among others (the Law), to IC 8-22-3 such that any county with a bracketed population of 300,000-400,000 was declared to have aviation governance in the form of a co-terminus Airport Authority possessing sovereign powers. Among them are the statutory powers to legislate, to tax, to bond, to take ground by eminent domain and to overrule local zoning authorities. Allen County is the only county that has ever satisfied the population criteria. The Authority is the federally recognized sponsor of Fort Wayne International Airport (kFWA) and Smith Field (kSMD). Its Board of Directors consists of six unpaid and appointed volunteers; three by the Mayor and three by the County Commissioners in staggered

terms. They are subject to City and County Councils' budgetary review but there is no record of it having ever been reviewed by either. Approximately 20% of their budget is funded by county property taxes.

The Authority recorded affidavits with the County Recorder claiming to have received title to the airports by the operation of the Law. We disagree. Moreover, Article IV, Section 23 of the Indiana Constitution prohibits legislation that does not operate uniformly throughout the state where it can be written to apply generally. We believe that IC 8-22-3-1.1 violates this prohibition in the Indiana Constitution.

The prime advocates involved in saving Smith Field since 2000, had little knowledge of the particular legal attributes of the Authority's establishment in 1985. It was not until February 2003, six months after the closure decision had been adopted by the Authority, that the Journal Gazette published an extensive cover story in the Sunday paper and we read a comprehensive report on the Indiana Supreme Court's recent ruling in *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003). SMDfund had just formally organized two days earlier with a plan to challenge the Authority's 2001 affidavits claiming title to lands under both airports. The *Kimsey* ruling changed everything.

Four days later, SMDfund filed a suit in Allen Circuit Court claiming: 1) unconstitutional 1985 enactment of Section 1.1 of IC 8-22-3 establishment of the Authority and 2) the Authority's claim of lawful transfer of title without benefit of deeds is ineffective.

The trial court indulged ad seriatim motions for dismissal until ruling that the general statute of limitations contained in IC 34-11-1-2(a) bars facial constitutional challenges after ten years. SMDfund gave notice of intention to appeal. The Authority then petitioned the Indiana Supreme Court for an emergency transfer. SMDfund agreed for other reasons and the Court heard oral argument on 30 October 2004. SMDfund argued that the complaint was a public interest complaint involving a violation of the Indiana Constitution and therefore could not be barred by any time constraint. On 2 August 2005, the Court unanimously affirmed dismissal based on the doctrine of laches. We believe this result stunningly defiant of any reasonable purpose for the Redress of Grievances Clause of the First Amendment to the United States Constitution.

Joe Tocci, petitioner pro se, asks that this Court grant its petition for a writ of certiorari to conform the Court's decision to existing Supreme Court authority, to harmonize the Indiana Court's result with the civil protections enumerated in the Constitution and to correct a result that, if left undisturbed, preserves a perpetual threat to this national historic treasure, establishes a precedent supporting takings without due process and thoroughly chills the hope of ordinary citizens from similar American communities to obtain judicial remedy to arbitrary rule by the executive and legislative branches of our governments.

ARGUMENT

A. The Indiana Supreme Court's Decision Violates The Redress Of Grievances Clause Of The First Amendment

Especially in a public interest dispute, an American court refusing to hear a constitutional grievance, faithfully brought, denies Plaintiff peaceable redress of grievances. George Washington said, "*Government is not reason. It is not eloquence. It is force.*" To deny redress is to allow this government to force its will over that of the people.

1. Balancing the Legislature's Prerogatives Against Constitutional Imperative. To allow a law to stand immune to constitutional muster is to immunize an alleged corruption and threatens the peoples' trust in the rule of law over the natural capacity of their lawmakers to dilute the rights that are otherwise protected by those constitutional constraints. To do so habitually is to unavoidably destroy that trust upon which a peaceable society must rely.

Justice Marshall, in *Marbury v. Madison*, (1 Cranch) 5 U.S. 137 (1803), wrote " *. . . the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is a proposition too plain to be contested, that [either] the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.*

Between these alternatives there is no middle ground. The constitution is either a superior paramount law,

unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further considerations of this subject."

It is the position of the Court that repugnancy is absolute and is, by definition, incompatible with the rule of law.

2. Immunity to Review. But is a court obliged to rule on the question?

"If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it may be not law, does it constitute a rule as operative as if it was a law? . . .

Can a doctrine, such as laches, operate to protect a law that is otherwise repugnant?

It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

The courts must decide constitutional challenges. No law, let alone a doctrine, trumps adjudication of constitutional challenges [faithfully brought]. Is this complaint faithfully brought?

In failing our initial two-year effort and immeasurable private and public funds to conform the Authority to the public will through grass roots politics, we sought judicial remedy.

We suspected that the lawsuit brought by SAFE, the popular Smith Field advocacy, that challenged the Authority's statutory capacity to close or sell any airport would fail under doctrines of administrative deference and fiduciary responsibility. On 4 November 2002, the Court denied SAFE's claim. Speaking at the podium at the Authority's January 2003 monthly board meeting, counsel for SAFE threatened to bring a tort complaint and promised that the board members would not escape personal liability if they did not return to negotiation. The senior board member responded later on television saying, " . . . we get sued all the time. We're not afraid of another SAFE lawsuit."

Within days, SMDfund (*Plaintiff*) organized to pursue a new approach. Although we couldn't stop the Authority from closing the airport, we might be able to prevent them

from demolishing and dispossessing the property. We hoped that if it returned to the possession of the City, we could preserve its title in the public estate until some time in the future when its status as an historic property may enable re-commissioning under another decision. We had discovered over a year earlier that, from 30 January to 28 February 2001, the Authority had recorded three affidavits with the Allen County Recorder claiming that lands previously recorded as Smith Field and Fort Wayne Municipal (International) Airport were transferred to the Authority on 1 July 1985 by operation of the establishment legislation, IC 8-22-3-1.1, et al. (the Act).

On 8 February we retained counsel to challenge adverse possession. The very next day, on 9 February, the Journal Gazette published a cover page review of the 13 January ruling by the Indiana Supreme Court upholding the Indiana Constitution's explicit prohibition of special legislation in *Kimsey v. South Bend*. We learned that the Authority had apparently been established unconstitutionally in one of these 'special laws.' Refusing to vitiate every law failing the new clarification, totaling ~500, the Court required that each one be tested where it may. Four days later, SMDfund filed a suit with two counts: 1) the originally planned objection to the Authority's affidavits claiming lawful transfer of title without benefit of deeds and 2) alleging unconstitutional 1985 enactment of Section 1.1 of IC 8-22-3 based on the *Kimsey* criteria for exceptions to Article IV, Section 23 prohibition.

This complaint is faithfully brought.

3. Primacy of Constitution Over Legislation.

Justice Marshall continues in Marbury, "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality ineffectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

By its decision, the Court has found that though Section 1.1 may be void, it shall be sustained rather than supercede the doctrine of laches. This result is backwards. The constitutional principle must always prevail over the conflicting law. It cannot do so without trial.

B. The Indiana Supreme Court's Decision Violates The Privileges And Immunities, Due Process And Equal Protections Clauses Of The Fourteenth Amendment

1. Land Title – The City of Fort Wayne never affirmatively conveyed or transferred ownership of any part of Smith Field or Fort Wayne International Airport to the Airport Authority or the predecessor Aviation Commission. The City still holds legal and equitable title to Smith Field and Fort Wayne International Airport and it cannot

be dispossessed from the public estate without first reverting to the City.

EXPLICIT DELINEATION BY THE ACT, IC 8-22-3-33: The legislature was explicit and comprehensive in its delineation of the types of property that the Act transferred. It is conspicuously silent on lands, ground and real property. Real property has distinct importance over other forms of property. We do not record the entitlement or transfer of equipment or commercial contracts or even bank accounts with the County Recorder. We do record deeds because the state has compelling interest in promoting clear title to land and its improvements.

CITIZENS' EQUITY INTEREST IN PUBLIC PROPERTY: Public property is just like any other property. All property possessed by American governments belonged to someone else before government took title. All title was purchased using funds or blood spent by people. It is only distinguished from private property in that it is held by each citizen in common with all other citizens. The sharing is with other citizens – not with government. In a country ruled by *government of the people, by the people and for the people*, all property controlled by American governments is actually held in custodial care on behalf of American citizens. It is the sharing among citizens that denies equity protections of American governments against ordinary citizens. In order to sustain classic equity rights to self-rule, as it applies to government property, no American citizen can be separated from his ownership of government property and every American government must be separated from ownership of all property. Likewise, no citizen can be disallowed preservation of her publicly owned property any more than that of her privately owned. Publicly owned real property is no more

susceptible to transfers among governments without deeds than is private real property.

A TAKING: Where one government can obtain title from another by operation of the sovereign power of a state law, which purports to vitiate the need for due process, the lawmaker has conducted a taking. American due process requires explicit naming of the real property at issue and payment of fair value to the party relinquishing title. The Act does not explicitly enumerate 'real property' as transferring to the Authority nor did anyone pay the City of Fort Wayne fair value for the property. The transfer of the property from public custodianship by one municipal body that is patently influenced by elections to another government that is not elected and has arrogantly demonstrated the opposite clearly diminishes the wealth and welfare of those citizens now disenfranchised..

We argue that the filing of affidavits alleging transfer of title without an explicit affirmation by the holder of record, the City of Fort Wayne, places title in a 'clouded' or contestable state. As the custodial protector of title to these lands, that city government is the only person empowered to lawfully relinquish title to a new owner. The standard legal device used for this affirmation is the endorsement of a deed. Three affidavits do not a deed make. The land remains the property of the people of the City of Fort Wayne and can only be transferred by due process as it applies to City government. This taking violates the Privileges and Immunities, Due Process and Equal Protections Clauses of the Fourteenth Amendment.

2. Establishment – Prior to the Act, Fort Wayne's airports were titled to the City of Fort Wayne and managed by the Aviation Commission, a department of City government under the direction of the mayor and subject

to normal oversight by the City Council – all elected officials. All attempts to close Smith Field prior to establishment failed ostensibly because those elected officials always yielded to popular will.

a) Politics Overwhelmed the Law – But there was another dynamic working outside the city's jurisdiction and in the county. By 1980, the state legislature had evolved IC 8-22-3 to provide an option for local governments to create or spin off an autonomous 'special district' government that was not burdened by the cost and time burdens associated with an elected leadership. The law keeps the special district connected to the influence of elected officials (rather than directly to voters) by their appointment of its board membership and council review of their budget. If the appointers refuse to recall directors or the councils refuse to review the district's annual budget, there is the potential for the district to run rogue of the people's will over any controversy.

In the early 1980s, city government was led by a Democrat mayor and a city council comprised of eight Democrats and only one Republican. Allen County government was just the opposite with county commissioners who had never been non-Republican since 1968 with the exception of one seat (1972) lasting one term. County government was perpetually starved for tax revenue. Apparently, county leadership grew increasingly frustrated with the mayor's refusal to share the tax revenue capacities of the city airports with county government by forming a shared aviation authority under IC 8-22-3. After a failed first try, the county Republican delegation to the state legislature succeeded in driving passage of a revision to the Law that forced the creation of a co-terminus special district.

The new Section 1.1 overrides the preceding Section 1, which formulates the method for creating an Aiport Authority generally. Section 1.1(a) establishes the population bracket that targets Allen County without naming the county. The court penetrates this transparent device for disguising localization of a law. Section 1.1(b) explicitly directs that this particular authority be treated as though it were created by Section 1.0 which is like saying that although we are ritually declaring that the sun rose in the west, we are to face it in the east and pretend that it is setting. It also withholds the right of remonstrance from the people of Allen County that is retained by all non-Allen County citizens. These plainly violate the Privileges and Immunities, Due Process clause and the Equal Protections clauses of the Fourteenth Amendment.

b) Constitutional Rule Is Dispositive – Article IV, Section 23 states, " . . . and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state. Section 1 of the Act *is* the generalized form. A generalized form exists and predates Section 1.1 by years. At least twelve airport authorities from other counties have been created under Section 1. The generalized form *is* plainly applicable. Therefore, since Section 1.1 is not general but specific to Allen County and since it does not operate anyplace else, let alone everyplace else, it is unconstitutional special legislation under the Indiana Constitution. The remaining question is whether there is some circumstance that is so unique to Allen County that it could require a localized form. That is a question of fact that the Authority only alluded to when pressed by the Court but reserved specifics as a question for trial. The Authority did suggest early on that because the City refused to cooperate politically, that the legislature had no choice. They have not indicated what drove the choosing, but we assert that

political intractability is not a legitimate excuse. In fact, it is precisely the least illegitimate excuse as it is the influence of local politics over the City's own assets that trumps the interests of all other parties.

These amendments include provisions that violate the Privileges and Immunities, Due Process and Equal Protections clause of the Fourteenth Amendment as well as the Indiana Constitution by 1) enacting contestably unconstitutional localized mandates, a violation of Article IV, Section 23 Prohibition of Localized Legislation, and 2) creates a new class of citizen inferior to all non-Allen County citizens in that they lack the power to refuse to form a special district government over their aviation assets and lack the right to remonstrate the legislature's decision to do so, violations of Article I, Section 23 Equal Privileges and Immunities.

C. The Indiana Supreme Court's Decision Violates Article IV, Section IV, Form Of Government Clause

1) Guarantee of Republican Form of Government – Some say that the apex of Renaissance achievement was the ratification of the Constitution of the United States of America. The most politically prolific aspect of the Renaissance, the Enlightenment, brought a new generation of political thinking that, among other things, reflected the transformation of political philosophy into political science. The most important principles established by the close of the Enlightenment were the rule of law; the requirement that republics reflect the self-interest of the people who were subject to its laws; that republics act in the national interest in ways which are understandable to the public at large; and that there be

some means of self-determination. Among the structural principles most effectively facilitating these ideals is separation of powers.

The Authority may be the fruit of a violation of the rule of law as required by Article IV, Section 23 of Indiana's Constitution. Its conduct since establishment hardly reflects the self-interest of the people subject to its laws, namely: clouding title to the people's land by attempting transfer of title by inventing fictitious and unlawful provisions of its enabling legislation in affidavits; strangling the maintenance and capitalization of the property's improvements; promising to invest $2.38M according to a publicly funded ALP and then silently withdrawing the plan before it could be recorded while spending only enough money over ten years to remain in compliance with federal airport safety regulations and demolish historic resources; claiming the Field was ineligible for federal capital assistance when it has always been eligible and merely lacked recording of a current version of the 1991 Coffman Airport Layout Plan (ALP); publicly funding the Airport Business Solutions (ABS), consultants, study as evaluating viability when it was advertised by ABS on their website as the "Fort Wayne Closure Study" and then trebling the announced cost of the contract in order to pace the protest and perfect justification for the closure vote; despite unambiguous unmitigated popular support for continuing operations and new investment, voting to close the Field at a special meeting that lasted 8 minutes 20 seconds gavel-to-gavel; spending a reported $100,000 in 92 days to defeat the advocates lawsuit rather than negotiate an alternative to closure; construct a sweetheart contract with the same notorious opponent in order to suppress the truth of the claims made by a new adversary; refusing to

enforce the terms of its own contract with its agent in violation of state law and at the predatory expense of the only profitable aeronautical business on the Field in more than ten years; dismissing the employee who protected the predatory agent on behalf of the Authority under a "confidentiality agreement" in the midst of a Federal Aviation Administration (FAA) examination of a formal Part 13 complaint; reporting to itself by seating 2 of its own board members on a 6-member "public" task force with 2 additional government employees in the fifth ALP related FAA study since establishment; burying the only fully developed revenue quantified ALP proposal ever developed for Smith Field in that task force; reporting out an ALP which central features that require demolishing a residential neighborhood and state and U.S. listed historic resources; promoting a plan whose revenue can be quantified as bankrupt and therefore incapable of meeting their own definition of viability and will thereby result in closure, however postponed; spending 32 months and an estimated $970,000 for undisclosed ex parte negotiations with the FAA and to sustain ad seriatim motions for dismissal instead of facing the substantive legal charges in our complaint.

It is hardly in the national interest, let alone understandable by the public at large, for the Authority to take federal assistance five times since establishment for studies fraudulently assured to lead to participation in the FAA's Airport Improvement Program. No ALP has ever been recorded by the FAA and no single dollar of capital assistance has ever been requested.

The decision was patently not consistent with the self-determination of the people subject to its rule when closing the Field obviously would evict its tenants' preferred home.

Being organized with the executive functions of the Director's office reporting to the legislative board cannot reflect the separation of powers. It is statutorily empowered to legislate, to tax, to bond, to take ground by eminent domain and to overrule co-jurisdictional zoning authorities but is supposed to be constrained by the power of the co-terminus governments to appoint/recall and withhold approval of its operating budget. The elected bodies refusing to threaten recall or to call review of their budget encouraged the Authority to run rogue.

The Authority has repeatedly declared publicly that it is the last word on all its decisions and ultimately defied the express will of the public in closing Smith Field. This conduct clearly reflects something other than a republican form of government.

CONCLUSION

The creation of constitutions is the keystone to the rule of law that America's founders innovated in that sweltering summer in Philadelphia. 90-year-old Franklin arrived on a stretcher to consolidate the miraculous successes that his countrymen so dearly won – not by praising the fractious sovereignty of the individual colonial states, but by bundling them with a new system severally founded on a new federal constitution. Despite all their parochial, often competitive if not incompatible sovereign state imperatives, they crafted a common legal platform upon which to stand up a new nation that all the states then ratified and upon which we all now rely. When challenged over the product of their secret proceedings

outside Independence Hall by an agitated citizen, Franklin replied, " . . . a republic madam, if you can keep it."

We are here to keep the republic; to resuscitate our precious rule of law over the tyranny of privilege in our own state's governance. No American law – federal or state – may be excused from review by its courts when legitimately contested on its constitutionality. To do otherwise is to imperil the hope for justice by those of our human family not yet blessed by their own version of Franklin's Grand Experiment. To allow such rulings by American courts devours the expectation by ordinary Americans that they will be treated fairly by their own government and can truly participate in the American dream. To do so is to prove to reasonable citizens everywhere that our rule of law has a double standard – one for citizens and one for citizen elites. To allow such rulings is to leave the people no alternative but devolution to the tyranny of special interests and hypocrisy in law or to open revolt.

If we prevail on the merits, the consequence is to revert all powers and responsibilities of the Authority to the control of City government. While the City governs, it will declare maintenance of all existing contracts and obligations in the prudential maintenance of its bond rating. It will them be up to City government as to whether they will agree with County Council to form a new Airport Authority, this time under the rules of IC 8-22-3 Section 1. Under this rule, the community has the right of remonstrance and may override any attempt by City Council to expropriate the airports – or may actually prefer to allow the transfer.

In any case, the cloud of title is removed as the affidavits are necessarily void and until the creation of a new

airport authority, title remains with the city. Whatever the result, it will have been the result of real self-rule and correction of a corrupt standard that has made cynics of us all. In doing so, we have come to expect business as usual to be the best advantage for influential elites and the reverse for ordinary citizens. Prevailing on the merits might just launch our town's own little renaissance.

From the CONSTITUTION OF THE STATE OF INDIANA

ARTICLE 1.

Bill of Rights.

Section 1. WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. **For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.**

Section 12. All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. **Justice shall be administered** freely, and without purchase; completely, and **without denial**; speedily, and without delay.

The Indiana Supreme Court's dismissal on the basis of laches renders Article I, Sections 1 and 12 of the Indiana Constitution meaningless. Perhaps more so than any previous review, this result institutionalizes legal defiance of both Constitutions and unambiguously rebukes the people's efforts to peaceably protect their own liberties

against the absolute power of the state. This decision creates undeniable evidence that the profound passivity of voters in our democratic processes is not the result of apathy, but of hopelessness.

Respectfully submitted,

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In the

Indiana Supreme Court

No. 02S00-0409-CV-410

SMDFUND, INC., ET AL.

Appellants (Plaintiffs below),

v.

FORT WAYNE-ALLEN COUNTY
AIRPORT AUTHORITY, ET AL.

Appellees (Defendants below).

Appeal from the Allen Circuit Court, No. 02C01-0302-PL-12
The Honorable Thomas J. Felts, Judge

On Petition To Transfer Pursuant
to Indiana Appellate Rule 56(A)

August 2, 2005

Boehm, Justice.

The plaintiffs challenge the constitutionality of the statute creating the Fort Wayne-Allen County Airport Authority. The Authority was created in 1985 pursuant to a statute the plaintiffs now contend violates the prohibition in the Indiana Constitution against special legislation. We hold that laches bars this claim.

Factual and Procedural Background

The Local Airport Authorities Act, Indiana Code section 8-22-3-1 *et. seq.* (2004), was first enacted in 1959. That act provides a means by which any county, city, town, or other municipal corporation may establish an airport authority. Under the act, the entity wishing to establish an airport authority adopts a resolution or ordinance establishing the authority. I.C. § 8-22-3-1. The registered voters of the district are then provided an opportunity to remonstrate against the establishment of the authority. I.C. § 8-22-3-2. Neither the City of Fort Wayne nor Allen County ever successfully established an airport authority under this statute.

The 1985 General Assembly amended the Local Airport Authorities Act to establish directly a joint city-county airport authority in any county having a population of more than 300,000 but less than 400,000. 1985 Ind. Acts 100, § 1; I.C. § 8-22-3-1.1. The bill created an airport authority to be known as "(name of second class city)-(name of county) Airport Authority." Allen County was and still is the only county that falls within this population parameter, and Ft. Wayne is the only city of the second class in Allen County. As a result, the Fort Wayne-Allen County Airport Authority was formed.

In June, 1985, the City of Fort Wayne and two Fort Wayne citizens filed a complaint for declaratory judgment in the Allen Superior Court contesting the validity of the 1985 legislation. The defendants were the Governor and Attorney General, both state officials. The plaintiffs alleged, among other things, that the legislation was unconstitutional special legislation in violation of Article IV, Section 23 of the Indiana Constitution. Seven days after the suit was filed, the court granted the plaintiffs' motion to dismiss the claim voluntarily with prejudice.

In February, 2003, SMDfund, Inc., Joseph Tocci, and Scott Noble, concerned that the Airport Authority planned to close Smith Field, filed a complaint in Allen Circuit Court against the Airport Authority, the City, and the County seeking a declaratory judgment that the Authority has no legal control over Smith Field, that the statute creating the Authority is unconstitutional special legislation, and that the City, not the Authority, holds legal title to Smith Field. The plaintiffs also sought an injunction preventing the Authority from closing, altering, or destroying Smith Field. The Authority moved to dismiss the complaint and the trial court granted that motion on the

ground of mootness. In October 2003, the plaintiffs filed an amended complaint, and the Authority responded with a motion to certify the case as a public lawsuit governed by Indiana Code section 34-6-2-124. The trial court granted that motion. The City and the Authority then filed for summary judgment, arguing that the plaintiffs' claims are barred by the statute of limitations and by the equitable doctrine of laches, and that the Public Lawsuit Act deprives the court of jurisdiction over the plaintiffs' claims. The trial court granted the defendants' motions to dismiss based on the statute of limitations. The plaintiffs appealed and sought transfer to this Court, bypassing the Court of Appeals pursuant to Indiana Rule of Appellate Procedure 56(A). This Court granted transfer.

I. Laches

"On appeal, the standard of review of a summary judgment ruling is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005). This Court can affirm a grant of summary judgment on any grounds as to which the designated evidence establishes no genuine issue of material fact. See *Douglass v. Irvin*, 549 N.E.2d 368, 371 (Ind. 1990).

The plaintiffs sought declaratory and injunctive relief. The defendants argue that the claim is barred by the ten-year general statute of limitations and by laches. The laches claim is dispositive. Laches is an equitable doctrine. *State ex rel. Attorney General v. Lake Superior* Court, 820 N.E.2d 1240, 1256 (Ind. 2005). A declaratory judgment is

not necessarily either equitable or legal. Rather, it "is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable." *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 824 (2d Cir. 1968). It was however, "born under equitable auspices and having preponderantly equitable affiliations.... it is probably less frequently employed on the law than on the equity side." Edwin Borchard, *Declaratory Judgments* 347 (2d ed. 1941). The status of a declaratory judgment as legal or equitable is determined by the nature of the suit. *Manning v. United States*, 146 F.3d 808, 812 (10th Cir. 1998); *Davidson v. Van Lenger*, 266 N.W.2d 436, 438 (Iowa 1978); *Coffee-Rich, Inc. v. Mich. Dep't of Agriculture*, 135 N.W.2d 594, 595 (Mich. Ct. App. 1965); *Lone Cedar Ranches v. Jandebar*, 523 N.W.2d 364, 367 (Neb. 1995); *International Health & Life Ins. Co. v. Lewis*, 530 P.2d 517, 518 (Or. 1975). 22A Am. Jur. 2d *Declaratory Judgments* § 2 (2003). "The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action." 22A Am. Jur. 2d *Declaratory Judgments* § 2. Here, the plaintiffs seek a declaration that the Fort Wayne-Allen County Airport Authority is invalid and has no control over the airports in Fort Wayne. This is the functional equivalent of an injunction against the Authority's operation as an established airport authority. The plaintiffs also seek an injunction preventing the Authority from closing Smith Field. We think both claims are grounded in equity. See *Employers Ins. of Wausau v. Shell Oil Co.*, 820 F.2d 898, 900 (7th Cir. 1987); *Boyles v. Hausmann*, 517 N.W.2d 610, 614 (Neb. 1994) (action to declare a restrictive covenant invalid is an equitable action); *Restatement (Second) of Judgments*, § 33 cmt. a (1980) (historically, a suit in equity might be taken to determine the rights of the

parties); 42 Am Jur. 2d *Injunctions* § 1 (2000) ("Injunction is an equitable remedy.").

Because this action is equitable, laches may operate to bar the claim. The general doctrine is well established and long recognized: "Independently of any statute of limitation, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them." *Penn Mutual Life Ins. Co. v. Austin,* 168 U.S. 685, 698 (1898) (quoting *Speidel v. Henrici,* 120 U.S. 377, 387 (1887)). Laches requires: "(1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party." *Shafer v. Lambie,* 667 N.E.2d 226, 231 (Ind. Ct. App. 1996). The first element is easily satisfied. The statute at issue was enacted in 1985, more than seventeen years before the plaintiffs brought this suit. The plaintiffs argue that they did not delay in exercising a known right because they brought suit only a few months after the Airport Authority voted to close Smith Field. We do not agree. Since 1985, the plaintiffs have been aware of the creation of the Authority, its public funding, and its operation of Smith Field. If they were unaware, they are nonetheless charged with notice of these activities by virtue of their public nature. See *Simon v. Auburn, Bd. of Zoning Appeals,* 519 N.E.2d 205, 215 (Ind. Ct. App. 1988) (plaintiff is charged with knowledge of the law, so laches barred attack on zoning ordinance); *Hutter v. Weiss,* 132 Ind. App. 244, 259, 137 N.E.2d 339, 346 (1961) (if circumstances should have put the plaintiff on inquiry and the plaintiff could have easily learned the truth the neglect of failure to make such inquiry will make the plaintiff guilty of laches just as if the facts were known

to the plaintiff); *See generally* 12 *Ind. Law Encyclopedia*, Equity § 28, at 272 (2001).

The time to bring a claim that the Authority was improperly constituted started with the formation of the Authority. The plaintiffs' contention is that the Authority was created improperly. If the plaintiffs are correct, their claim accrued at the time of the creation of the Authority or at the latest when it began collecting taxes. In *State ex rel. Attorney General v. Lake Superior Court*, 820 N.E.2d 1240, 1256 (Ind. 2005), this Court addressed a claim that a statute providing special procedures for reassessment of property in Lake County was unconstitutional, but found that laches would bar the claim. We explained: "As early as 1996, the need for reassessment was obvious. . . . The county's taxing authorities are now dependent on the results of that process to move forward, if belatedly, to proceed with the ordinary process of funding government. Under these circumstances laches bars granting of an injunction based on facts and theories available to the plaintiffs three years earlier." *Id.* Similarly, in this case, the plaintiffs challenge the creation of the Authority over seventeen years ago. In the intervening period the Authority has raised taxes, issued bonds, and done the other things necessary to operate the airports in Allen County, all in reliance on the Authority's valid existence.

Plaintiffs cite *Indiana Department of Insurance v. Vernon General Insurance Co.*, 784 N.E.2d 556 (Ind. Ct. App. 2003), for the proposition that their injury is only recent and therefore not barred by laches. In 2000, the Department of Insurance sued Vernon, a special charter insurance company, for operating on terms that were

prohibited under a 1961 law regulating credit accident insurance.[1] Vernon successfully defended on the ground that its 1851 charter permitted unregulated operation, and the 1973 law repealing the charter was an unconstitutional impairment of contract. The Court of Appeals rejected the Department's claim that Vernon's challenge to the 1973 repeal of the 1851 statute was barred by laches. The court reasoned, "the record reflects that Vernon has continuously acted in accordance with the terms of its special charter. There is no evidence that Vernon needed to assert the rights under its charter or the 1942 Declaratory Judgment until the Department filed its Statement of Charges on October 17, 2000." *Id.* at 565. Further, the court found that the acts that granted Vernon's special charter were not repealed when the laws were codified and preserved in 1973. *Id.*

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[1] Vernon Insurance Company operated under a special legislative charter passed in 1851 shortly before the 1851 Indiana Constitution was adopted. The charter granted Vernon "the right to engage in any and all forms, kinds, and classes of insurance." *Id.* at 558. For fifteen years, Vernon operated without regulation. An 1899 law specifically regulated special charter insurance companies, and in 1935, the Indiana Insurance Law created the Department of Insurance and provided a more complicated regulatory scheme. *Id.* Vernon was inactive from 1910 until it resumed operation in approximately 1940 and obtained a declaration from the trial court that the 1935 Act did not apply to it because the Indiana Constitution prohibited legislation that impaired rights granted to Vernon under its 1851 special charter. *Id.* No appeal was taken. *Id.* In 1961, the General Assembly for the first time sought to regulate credit accident insurance, and in 1964, the Department of Insurance sent Vernon a letter recognizing Vernon's status as a special charter insurance company and expressing its opinion that it had no authority over Vernon. *Id.* The 1973 recodification of the Indiana Code repealed nearly all acts prior to the codification, but provided that it did not affect the "rights, privileges or liabilities accrued, remedies provided, duties imposed, penalties incurred, or proceedings begun before the effectiveness of this Code." *Id.*

The plaintiffs reason that just as Vernon's rights were not under attack by the Department until 2000, the plaintiffs here acted promptly when Smith Field was threatened by the Airport Authority. We do not agree. Vernon was operating under a valid statute and until 2000 had no reason to predict that the Department of Insurance might challenge its authority. Indeed it had received the 1942 declaratory judgment and a 1964 letter from the Department that it was exempt from regulation. In contrast to Vernon, the plaintiffs in this case, like all other citizens of Allen County, were directly affected by the statute that created the Fort Wayne-Allen County Airport Authority in 1985. At that point, the Authority began operations, issued bonds, and imposed taxes.

The plaintiffs point out that they, as Allen County taxpayers, pay property taxes for the Authority. Therefore, they argue, like the taxpayers who challenged the constitutionality of the property tax assessment system in *State Board of Tax Commissioners v. Town of St. John,* 702 N.E.2d 1034 (Ind. 1998), they are entitled to challenge the Authority's existence. Again, we disagree. *Town of St. John* addressed an allegation that the method of valuing property for tax purposes violated the requirements of Article X, Section 1 of the Indiana Constitution. It was a claim that the substance of the property tax assessment statute was unconstitutional. Otherwise stated, it was a claim that the property tax assessment system violated the substantive constitutional provision of Article X, Section 1 which requires a "uniform and equal rate of property assessment and taxation." The plaintiffs in this case do not challenge the constitutionality of the substance of the Authority statute. Nor do they challenge any action that the Authority has taken or will take on any ground other

than the allegedly defective legislative authorization to create the Authority. They challenge only the procedure by which the Authority statute was passed: the alleged failure of the legislature to abide by the Constitution's prohibition on special legislation.

There is nothing substantively unconstitutional about an airport authority. The plaintiffs here make no claim that the creation of an airport authority is beyond the power of the legislature, and any such claim would be frivolous. Obviously a statute creating an authority in every county would raise no issue of special legislation. And as we explained in *City of South Bend v. Kimsey,* 781 N.E.2d 683 (Ind. 2003), special legislation may be constitutional if it is based on distinct characteristics of the affected locality. Even if the plaintiffs could establish that Allen County lacked the characteristics justifying special legislation, an authority in Allen County could nevertheless long ago have been constitutionally created by several forms of legislation or local action. Accordingly, for purposes of the laches doctrine, the claim of the plaintiffs here is fundamentally different from that of the taxpayers in *Town of St. John.*[2]

Seventeen years is surely an unreasonable delay, but laches does not turn on time alone. "A mere lapse in time is insufficient; unreasonable delay which causes prejudice or injury is necessary." *Shafer,* 667 N.E.2d at 231. The

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[2] It may be that a defense of laches would be available in some circumstances even where the claim is one of unconstitutionality in substance. No claim of laches was asserted in *Town of St. John* and we are not presented with that question here. We do hold that the defense of laches is available where, as here, the only claim is that a statute was enacted by a procedure that violated the Constitution.

required prejudice may be created "if a party, with knowledge of the relevant facts, permits the passing of time to work a change of circumstances by the other party, laches may bar the claim." *State ex rel. Atty. Gen.*, 820 N.E.2d at 1256 (citing *Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996)). The Authority has established that it would be prejudiced if this suit were allowed to proceed. The prejudice occurred when the Authority in reliance on the statute issued bonds and again when it took over operation of Smith Field. As the Supreme Court of the United States observed in *Penn Mutual*, "where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches." 168 U.S. at 698. Since its creation, the Authority has incurred debt exceeding $44,000,000 and has entered into a variety of leases, contracts, and other obligations, some of which extend for sixty-eight years into the future. We readily find laches in this seventeen-year delay.

The defendants also argue that the seventeen year delay in bringing suit has prejudiced the Authority by impairing its ability to establish the circumstances justifying special legislation.[3] This is plausible but we need not address it because the other claims of prejudice are sufficient.

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[3] The Authority contends that there were a variety of unique characteristics justifying creation of an airport authority in Allen County in 1985. The record on this point was undeveloped when the trial court granted summary judgment on other grounds. We need not resolve it here.

In short, laches bars the plaintiffs' claim. Because we hold that the plaintiffs' claim is barred by laches, we need not address the statute of limitations issue which was the basis of the trial court's ruling reaching the same result. We affirm the trial court's entry of summary judgment for the defendants.

II. Claim of Title to Airport Property

The plaintiffs also argue that they raised a claim at trial court that the City of Fort Wayne, not the Airport Authority, holds title to Smith Field and that the trial court improperly disposed of this argument on summary judgment.

In Count II of the plaintiffs' amended complaint, at paragraph 38, the plaintiffs allege that the City of Fort Wayne holds legal and equitable title to Smith Field and Fort Wayne International Airport. The plaintiffs argue that the Authority's motion for summary judgment did not address this issue and this issue was not properly before the trial court and therefore remains to be resolved. The Authority responds that this "title claim" is nothing more than an allegation that the City owns this property contained in the same count as the claim that the statute creating the Authority is unconstitutional. No basis for that allegation is alleged other than perhaps an inference to be drawn from the claimed unconstitutionality of the Airport Authority Statute. The Authority asserts that the plaintiffs did not contend in the trial court that the title claim was a separate cause of action, so the plaintiffs may not raise on appeal an issue not properly presented to the trial court. When the Authority moved for summary judgment, the plaintiffs responded, also asking for

summary judgment. The plaintiffs did not mention this claim in their trial brief, assert it in the statement of disputed facts, or designate any evidence as to it. Rather, it stands simply as an allegation in the claim that we hold barred by laches. We agree that this claim was not properly presented to the trial court as a separate ground for relief, and do not read it as stating a claim.

Conclusion

The judgment of the trial court is affirmed.

Shepard, C.J., and Dickson, Sullivan, and Rucker, JJ. concur.

STATE OF INDIANA	)	**IN THE ALLEN**
	) SS:	**CIRCUIT COURT**
COUNTY OF ALLEN	)	**CASE NO. 02C01-0302-PL-12**

SMDfund, INC., JOSEPH TOCCI And SCOTT W. NOBLE,

Plaintiffs,

VS.

FORT WAYNE-ALLEN COUNTY AIRPORT AUTHORITY, CITY OF FORT WAYNE and ALLEN COUNTY,

Defendants.

ORDER OR JUDGMENT OF THE COURT

The Court, having taken Defendants' Amended Motion for Summary Judgment (filed March 31, 2004) under advisement, now enters the following Order:

ISSUES PRESENTED

1. Whether the doctrine of the statue of limitations precludes citizens from contesting the constitutionality of a statue [sic] that provides a basis for the formation of an airport authority 17 years after the statute was enacted;

2. Whether the doctrine of lathes precludes citizens from contesting the constitutionality of a statute that provides a basis for the formation of an airport authority that was created more than 17 years prior to this action; and

3. Whether the Public Lawsuit Act bars citizens from filing a claim contesting the constitutionality of a statute that provides a basis for the formation of an airport authority because a similar lawsuit filed in 1985 may have constituted a public lawsuit.

STATEMENT OF FACTS

In 1959, the General Assembly of the State of Indiana enacted what is now known as the Local Airport Authorities Act. This Act allows the fiscal body of one or more eligible entities (city, county, municipal corporation, etc.) that may be acting individually or jointly to adopt an ordinance in favor of the establishment of an airport authority. Ind. Code §8-22-3-1 (Burns 2004). The Act further stated that once such an authority has been established, the registered voters of the district in which the authority is located may remonstrate against the establishment of the authority if such petition is filed within 30 days of the adoption of the ordinance. Ind. Code §8-22-3-2 (Burns 2004).

In 1985, the General Assembly of the State of Indiana passed a bill that amended Ind. Code §8-22-3-1 establishing that a joint city-county airport authority may be created in a county having a population of more than 300,000 but less than 400,000. Ind. Code § 8-22-3-1.1 (Burns 2004) The amended statute repeals Ind. Code §8-22-3-2 and therefore prohibits registered voters living in the district of the authority the opportunity to remonstrate against the establishment of such authority. Ind. Code § 8-22-3-I.1(b) (Burns 2004).

The City of Fort Wayne has two airports – Fort Wayne International Airport and Smith Field. Prior to 1985, both Fort Wayne airports were owned and operated by the City of Fort Wayne and were managed by the Board of Aviation Commissioners. Prior to 1985, Fort Wayne had never established an airport authority pursuant to the general statutory scheme implemented by the Local Airport and Authorities Act. In compliance with the 1985 amendment made by the General Assembly and under the direction of the specifications stated in the amended statute, a joint airport authority was created between the City of Fort Wayne and Allen County. To this day, Allen County is the only county in Indiana that meets the requirements of the specific population bracket stated in the statute.

In June of 1985, the City of Fort Wayne and two Fort Wayne citizens filed a complaint for declaratory judgment in the Allen Superior Court against the Governor and the Attorney General of the State of Indiana. (Complaint for Declaratory Judgment, filed June 3, 1985). This lawsuit contested the validity of the 1985 legislation creating an airport authority in Allen County by declaring the statute unconstitutional. This allegation was founded upon the contention that the legislation constituted special legislation and therefore violated Article IV, Section 23 of the Indiana Constitution. Furthermore, the complaint alleged that such legislation was unconstitutional because it deprived the plaintiffs of their right to vote on the establishment of the authority. However, seven days after this suit was filed, the plaintiffs filed a motion to voluntarily dismiss their claim with prejudice. The Allen Superior Court granted the motion to dismiss on June 10, 1985.

Since 1985, the Fort Wayne-Allen County Airport Authority (Authority) has owned and operated both

airports located in Fort Wayne, Indiana. The Authority has managed the airports in accordance with the Local Airport Authorities Act with the only exception being that the public was never afforded the opportunity to remonstrate and vote against the Authority's establishment. The Authority has also issued general obligation bonds for the purpose of obtaining funds for operation costs. Ind. Code § 8-22-3-16 (Burns 2004). The value of these bonds currently total over 44 million dollars. Respondent's Motion for Summary Judgment pg. 4. The Authority has also initiated a total of 120 different lease agreements with 92 tenants. These lease agreements range from terms of month to month to 68 years.

On February 12, 2003, SMDfund, Inc., Joseph Tocci and Scott W. Noble filed a complaint with the Allen Circuit Court. This complaint states that the Fort Wayne-Allen County Airport Authority does not possess any legal control over Smith Field and the statute creating the Authority is unconstitutional as "special legislation". The complaint further seeks injunctive relief preventing the Authority from closing, altering or destroying Smith Field.

On April 1, 2003, Fort Wayne-Allen County Airport Authority filed a motion to dismiss due to mootness in response to SMDfund's complaint. The Court treated the Authority's motion to dismiss as two separate motions: a motion to dismiss for mootness and a motion to dismiss for a lack of standing. The Court denied the Authority's motion to dismiss for lack of standing but granted the Authority's motion on the grounds of mootness.

On October 10, 2003, the Plaintiffs filed an amended complaint seeking a declaration that Ind. Code § 8-22-3-1.1

is unconstitutional special legislation and that the Authority has no legal status pursuant to the statute. In addition, the amended complaint seeks injunctive relief preventing the Authority from exerting control over the airports based on the allegations that Ind. Code § 8-22-3-1.1 is unconstitutional.

On October 24, 2003, the Authority filed a motion to certify the cause as a public lawsuit. This motion sought an order to certify this lawsuit as a "public lawsuit" as defined by Ind. Code § 34-6-2-124. The Court granted the motion certifying this lawsuit as a public lawsuit thereby requiring it to be brought in compliance with the Indiana Lawsuit Act. Ind. Code § 34-13-5 (Burns 2004).

On March 30, 2004, the Authority filed a motion for summary judgment. On May 10, 2004, the Defendant, City of Fort Wayne, filed its motion for summary judgment, and, on May 14, 2004, Defendant, Allen County, filed its motion for summary judgment. Both motions for summary judgment adopt, in their entirety, the grounds and designation of evidence set out by the Defendant Authority in its motion for summary judgment and this Court Order shall be deemed dispositive regarding all three motions for summary judgment.

DISCUSSION

Summary judgment allows a judgment to be granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. A material fact is a fact that may affect the outcome of the suit under the governing law. Genuine means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

In this case, the Authority has filed a motion requesting that summary judgment be granted upon three distinct grounds. First, the Authority believes that Plaintiffs' claims are barred by the applicable statute of limitations. Second, the Authority claims that Plaintiffs' cause is barred by the equitable doctrine of laches. Finally, the Authority alleges that the Court cannot properly exercise jurisdiction over Plaintiffs' lawsuit pursuant to the Public Lawsuit Act.

I. Statute of Limitations

The purpose of the statute of limitations is to establish a time limit for suing in a civil case based on the date when the event causing the injury transpired.

In the Authority's motion for summary judgment, the party's reasoning for why the statute of limitations precludes Plaintiffs' claims is based upon many factors. In its motion for summary judgment, the Authority recognizes the complexity of applying the statute of limitations to an issue challenging the constitutionality of a statute. In the past, courts have differentiated between facial challenges and as-applied challenges and have implemented this limitation analysis to statutes. *Kuhnle Brothers v. County of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997); *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991). A facial challenge is a claim that the "mere enactment" of a statute is unconstitutional. *National Advertising Co.*, 947 F.2d at 1166. An as-applied challenge focuses on the effect of a statute's application to specific property and individuals. *Id.*

Under an as-applied challenge, the statute of limitations does not commence until after the unconstitutional

act ceased to exist. This type of constitutional violation is often referred to as a "continuing violation". *Kuhnle Brothers*, 103 F.3d at 520. In a facial challenge, the statute of limitations begins to run on the date the statute was enacted. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991). Although it is ultimately the Court's discretion to determine whether a constitutional violation is a continuing violation, Plaintiffs' complaint seems to constitute a facial challenge.

Plaintiffs brought a claim challenging the constitutionality of the creation of the statute establishing the Fort Wayne-Allen County Airport Authority. The Plaintiffs allege that the statute is invalid because it constitutes special legislation and therefore violates Article IV, Section 23 of the Indiana Constitution. Since its inception in 1985, the actions of the Authority have been in compliance with the Local Airport Authorities Act and therefore cannot be considered a continuing violation. The only harm that may be complained of is due to the method in which the Authority was created. The Plaintiffs allege that the enactment of Ind. Code § 8-22-3-1.1 never afforded the registered voters the opportunity to remonstrate against the creation of the statute. Since Plaintiffs only challenge the creation of the statute and not the operation thereof it should be determined that Plaintiffs have fled a facial challenge.

Although it may be determined that the Plaintiffs' claims fall within a facial challenge, the applicable statute of limitations period still remains unanswered. The Authority states that because the only injury involved is the public's loss of opportunity to remonstrate against the statute's creations (a right that is limited to 30 days), the applicable statute of limitations should be 30 days from

the establishment of the Authority. Although this is a creative argument, it does not apply to this case because the period of 30 days in which the public can remonstrate against an act does not apply to the contested statute. Ind. Code § 8-22-3-1.1(b) (Burns 2004). A much stronger argument made by the Authority is that the applicable statute of limitations should be the 10 year period that applies to all causes of action for which a statute of limitations is not specifically stated elsewhere. Ind. Code § 34-11-1-2(a) (Burns 2004). Since Indiana Does not have a statute of limitations that applies specifically to a constitutional challenge premises on special legislation, the general statute of limitations would apply to this case and bar Plaintiffs' claim

The Plaintiffs argue that the statute of limitations does not apply to this lawsuit because the statute should be considered special legislation therefore allowing Plaintiffs to bring a claim at anytime. The Plaintiffs base this reasoning from a case in which property owners filed a remonstrance and presented a petition in opposition to annexation by the defendant city. *Municipal City of South Bend, IN v. Kimsey*, 781 N.E.2d 683 (Ind. 2003). In order for Plaintiffs' argument to proceed, it must be determined whether the statute creating the Authority is unconstitutional on the premise of special legislation.

According to *Kimsey*, in 1993, the Indiana General Assembly added a subsection to Ind. Code § 36-4-3-13. This new subsection granted the right to challenge and defeat annexation if a majority of landowners in the affected area opposed it. *Kimsey*, 781 N.E.2d at 684. The subsection further stated:

> (g) This Subsection applies only to cities in a county having a population of more Than two hundred thousand (200,000) but less than three hundred thousand (300,000) . . .

Ind. Code § 34-4-3-13(g) (West's 2002). At the time this amendment was enacted and ever since ten [sic], this provision has only applied to St. Joseph County. In all other counties, the current statutory requirement for opposition to annexation is 65% of the affected landowners. *Id.* at 685.

In 1996, residents in St. Joseph County filed a remonstrance and presented a petition in opposition to an annexation. Subsequently, the City of South Bend filed a counterclaim seeking a declaratory judgment that subsection (g) was unconstitutional special legislation in violation of Article IV, Section 23 of the Indiana Constitution. *Kimsey*, 781 N.E.2d at 685. The trial court denied the motion ruling that subsection (g) was general legislation. *Id.* Upon review, the Supreme Court of Indiana reversed the lower courts' rulings stating that subsection (g) was special legislation that was specifically created to apply to St. Joseph County and was therefore unconstitutional.

In *Kimsey*, the Indiana Supreme Court distinguished between general and special legislation. A statute is general legislation if it applies to all persons or places of a specified class throughout the state. *Kimsey*, 781 N.E.2d at 689. A statute is special legislation if it pertains to and affects a particular person, place or thing (as opposed to the general public). *Id.* at 690. In order to determine whether a statute is unconstitutional under Indiana Constitution Article IV, Section 23, it must first be determined whether the law is general or special. *Id.* If the law is general, it must then be determine [sic] whether it is

applied generally throughout the state. *Id.* If the statute is considered special legislation, then it must be decided whether it is constitutionally permissible. *Id.*

The Indiana Supreme Court determined that a statute with a population category is a special law if it is designed to operate upon or benefit only particular municipalities. *Kimsey*, 781 N.E.2d at 691. In addition, if a statute contains language specifying locality then the statute is special legislation and is unconstitutional under Article IV, Section 23. *Id.* at 691. However, a general statute may also be unconstitutional if the population classifications are unrelated tot he [sic] characteristics that define the class. *Id.* at 692.

Like *Kimsey*, this case challenges whether an Indiana statute may be declared constitutional pursuant to Article IV, Section 23. This section of the Indiana Constitution states,

> . . . all cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

Kimsey, 781 N.E.2d at 687. However, unlike the statute being challenged in *Kimsey*, there is no evidence that the population category contained in Ind. Code § 8-22-3-1.1 is designed to operate upon or benefit only particular municipalities and thus may not constitute special legislation.

The Plaintiffs also state that the Court's ruling in *Kimsey* is a landmark decision. "unarguably establishing new legal frontiers . . . in analyzing statutes". (Plaintiffs' Reply Brief pg. 2). Plaintiffs further state that *Kimsey* reverses previous cases and provides a clear solution that "bracketed" population figures in a statute is special

legislation. *Id.* Although Plaintiffs' interpretation is beneficial to their argument, it is erroneous. The Indiana Supreme Court explicitly states that *Kimsey* adds no new doctrine to the analysis of previous cases pertaining to special legislation. *Kimsey*, 781 N.E.2d at 696. *Kimsey* also provides no analysis that reverses the Court's decisions in past cases nor establishes any new legal frontier in analyzing whether a statute may be considered unconstitutional on the premise of special legislation. *Id.*

In the Authority's motion for summary judgment, it specifically states that its summary judgment motion does not address the issue challenging the validity of the statute. The Authority's motion for summary judgment requests that Plaintiffs' claim be barred because the statute of limitations precludes any challenge to the constitutionality of the statute.

Plaintiffs' claim was filed more than 17 years after the enactment of the challenged statute. Because the challenged statute may be considered constitutional and Plaintiffs filed a facial challenge, the general statute of limitations of ten years bars Plaintiffs from filing such a claim. In addition, Plaintiffs failed to provide evidence that a genuine issue of material fact existed regarding the time limit for challenging whether a statute was unconstitutional providing grounds for the Authority's motion for summary judgment.

II. Doctrine of Laches and III. Subject Matter Jurisdiction

Since the Court has determined the Authority's motion for summary judgment shall be granted on the basis of the statute of limitations, further discussion on

the issues of doctrine of laches and subject matter jurisdiction are moot.

ORDER

The Fort Wayne-Allen County Airport Authority's Amended Motion for Summary Judgment (filed March 31, 2004) is granted. As set forth above, the City of Fort Wayne's Motion for Summary Judgment (filed May 10, 2004) is granted. Allen County, Indiana's Motion for Summary Judgment (filed May 14, 2004) is granted. Fort Wayne-Allen County Airport Authority's Motion to Dismiss (filed April 22, 2004) is ordered withdrawn.

DATED: June 28, 2004

/s/ Thomas J. Felt
Thomas J. Felt, Judge
Allen Circuit Court

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No. 05-561

IN THE

Supreme Court of the United States

JOSEPH TOCCI,

Petitioner,

v.

FORT WAYNE-ALLEN COUNTY AIRPORT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION FOR RESPONDENT FORT WAYNE-ALLEN COUNTY AIRPORT AUTHORITY

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QUESTION PRESENTED FOR REVIEW

Whether a facial challenge, based on the Indiana Constitution's prohibition against special legislation, to an Indiana statute seventeen years after its enactment is barred by laches.

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STATEMENT OF BASIS FOR JURISDICTION

The United States Supreme Court does not have jurisdiction over this action because the lower court decided a facial challenge to an Indiana statute under the Indiana State Constitution pursuant to Indiana law, and no federal question was raised below.

CONSTITUTIONAL PROVISION AND STATUTE AT ISSUE

No Federal Constitutional provision or statute is at issue. The issues involved are Indiana common law and Indiana State Constitutional and statutory provisions.

Article IV, Section 23 of the Indiana Constitution provides:

> In all cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

Ind. Const. of 1851, art. IV, § 23 (1851).

Indiana Code, Section 8-22-3-1.1 provides:

> (a) Notwithstanding section 1 [IC 8-22-3-1] of this chapter, an airport authority is established in a county having a population of more than three hundred thousand (300,000) but less than four hundred thousand (400,000).

> (b) For the purposes of this chapter, an authority established under this section shall be treated as if it had been established by an ordinance of the fiscal body of the county. However, section 2 [IC 8-22-3-2] of this chapter does not apply to such an authority.
>
> (c) The name of an authority established under this section is '(name of second class city)-(name of county) Airport Authority'.

Ind. Code § 8-22-3-1.1 (Burns 2000).

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Joseph Tocci ("Petitioner") and two other parties filed a civil declaratory judgment action in the Allen (County, Indiana) Circuit Court challenging the creation of the Fort Wayne-Allen County Airport Authority ("Airport Authority"). (R.[1] at 104-13.) Petitioner alleged that the enabling statute was unconstitutional special legislation under Article IV, Section 23 of the Indiana Constitution. (R. at 109.) After an initial complaint filed by SMDfund, Inc. was dismissed for mootness, SMDfund, Scott Noble and Petitioner (collectively, "plaintiffs") filed an amended complaint for declaratory judgment and injunction against Respondents here — the Airport Authority, the City of Fort Wayne ("Fort Wayne") and Allen County (collectively as the "Respondents"). (R. at 102-13.) Specifically, Petitioner

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1. The Record below consists of one volume entitled "Appellants' Appendix."

sought a declaration that the Airport Authority had no legal status or existence and injunctive relief to prevent the Airport Authority from exerting control over the two airports located in the Fort Wayne area. (R. at 109-12.)

Upon the Airport Authority's motion and plaintiffs' stipulation, the trial court certified the cause as a public lawsuit, as defined by Indiana Code § 34-6-2-124. (R. at 133.) The Airport Authority, Fort Wayne and Allen County all filed motions for summary judgment; plaintiffs responded; and the Airport Authority replied. (R. at 135-36; 157-58; 180-81; 188-96; 197-98; 199-213; 214-221.) The trial court held a hearing on the summary judgment motions. (R. at 24-64.) After taking the matter under advisement, the trial court entered summary judgment in favor of the Respondents on the grounds that plaintiffs' claims were barred by Indiana's ten-year general statute of limitations. (R. at 18-23.) The plaintiffs timely filed a notice of appeal of the trial court's order. (R. at 230-31.)

Both the Airport Authority and plaintiffs moved the Indiana Supreme Court to accept jurisdiction of a direct appeal pursuant to Ind. App. R. 56(A), thus bypassing the Indiana Court of Appeals. The Indiana Supreme Court accepted jurisdiction, and the appeal was fully briefed and argued. On August 2, 2005, the Indiana Supreme Court issued its unanimous opinion holding that the doctrine of laches barred plaintiffs' claim. Petitioner timely filed his Petition for Writ of Certiorari to the United States Supreme Court on October 31, 2005, and it was docketed on November 2, 2005. The Airport Authority respectfully requests this Court to deny certiorari. Co-respondents City of Fort Wayne and Allen County join in this Brief in Opposition.

B. Factual Background

In 1959, the General Assembly of the State of Indiana enacted what is now known as the Local Airport Authorities Act which authorized the creation of airport authority districts. *See*, Ind. Code § 8-22-3-1, *et seq.* (Burns 2000). The airport authority districts had the power to acquire, establish, construct, improve, equip, maintain, operate and finance airports and landing fields, among other certain powers. *Id.* In its current form, the Local Airport Authorities Act provides a general means by which a municipal corporation or district may establish an airport authority. Ind. Code §§ 8-22-3-1; and 8-22-1-6 (Burns 2000).

Before 1985, the City of Fort Wayne owned and operated two airports through a Board of Aviation Commissioners. (R. at 160.) Neither the City of Fort Wayne nor Allen County ever successfully established an airport authority pursuant to the Local Airport Authorities Act. (*Id.*) During its 1985 term, the General Assembly of the State of Indiana passed a bill to amend the Local Airport Authorities Act to establish a joint city-county airport authority in a county having a population of more than 300,000 but less than 400,000. *See*, Ind. Code § 8-22-3-1.1 (2000). At that time and currently, Allen County was the only county that fell within the specified population class. *See*, *id.* The bill creating the joint airport authority took effect on July 1, 1985. *Id.*

In June of 1985, the City of Fort Wayne and two Fort Wayne citizens filed a complaint for declaratory judgment in the Allen Superior Court against the then-Governor of Indiana and the then-Attorney General of Indiana. (R. 162-69.) The lawsuit sought to declare the legislation establishing an airport authority in Allen County unconstitutional as

special legislation in violation of the Indiana Constitution. (*Id.*) The complaint alleged that the legislation deprived the citizen plaintiffs the right to vote on the question of the establishment of the airport authority. (*Id.*) Shortly after filing the lawsuit, the plaintiffs moved to dismiss their claims with prejudice, which motion was granted. (R. at 170.)

Since its creation in 1985, the Airport Authority has owned and operated both Fort Wayne based airports under the name of the Fort Wayne-Allen County Airport Authority. (R. at 161.) With the exception of the Airport Authority's establishment of itself, the Airport Authority has acted pursuant to and derives its powers from the general statutory scheme provided by the Local Airport Authorities Act. (*Id.*) The only distinction between the Fort Wayne-Allen County Airport Authority and any other joint airport authority created pursuant to the general provision of the Local Airport Authorities Act is the fact that the public was not provided an opportunity for remonstrance and vote against the Fort Wayne-Allen County Airport Authority's establishment. *Compare* Ind. Code § 8-22-3-1 & 2 (Burns 2000) *with* Ind. Code § 8-22-3-1.1 (Burns 2000).

In the twenty years since the Airport Authority's creation, it has continued to operate in a general capacity under the general statutory scheme, including issuing bonds and entering leases. (R. at 161.) At the time of the lawsuit, the Airport Authority's outstanding bond balance exceeded $44,000,000. (*Id.*) Also, at that time, the Airport Authority had approximately 120 different lease agreements with ninety-two different tenants that ranged in length from month-to-month to a term of sixty-eight years. (*Id.*) Ten of the Airport Authority's outstanding leases contained terms in excess of thirty years. (*Id.*)

Petitioner's complaint sought to challenge the constitutionality of the Fort Wayne-Allen County Airport Authority's enabling statute under the Indiana Constitution's prohibition against special legislation. (R. at 104-13.) The Airport Authority moved for summary judgment based on statute of limitations, laches, and lack of subject matter jurisdiction. (R. at 157-58.) The trial court entered summary judgment in favor of the Respondents on the basis of statute of limitations. (R. 18-23.) Upon review by the Indiana Supreme Court, summary judgment was upheld on the grounds of laches. *SMDfund, Inc. v. Fort Wayne-Allen County Airport Auth.*, 831 N.E.2d 725, 727 (Ind. 2005)

At no point in the trial court or on appeal to the Indiana Supreme Court did Petitioner or any other plaintiff raise an issue based on a federal statute, treaty or the United States Constitution. The action below was based on an Indiana statute challenged under the Indiana Constitution and was decided under Indiana common law. Petitioner's Petition for Writ of Certiorari is the first time an issue under the Federal Constitution has been argued. As such, neither the trial court nor the Indiana Supreme Court had any federal issue before them and had no opportunity to rule on any such question.

C. Perceived Misstatements in Petitioner's Statement of the Case

Pursuant to Supreme Court Rule 15.2, Respondents are obligated to point out perceived misstatements of fact or law in the Petition. S. Ct. R. 15.2. Nearly the entire statement of the case presented by Petitioner is a misstatement because it consists of opinion, argument and conjecture that are wholly unsupported by the record in the courts below. Indeed, Petitioner offers no citation whatsoever to the record below.

The following statements from the Petitioner's Statement of the Case are the only statements with which Respondents agree and that are not misstatements of fact or law.

> **Smith Field** is a publicly owned general aviation (GA) airport in Fort Wayne, Indiana. . . . [Pet., p. 2 (emphasis in original).]
>
> . . .
>
> **Fort Wayne-Allen County Airport Authority** (*Respondent*, the Authority), a special district of Indiana government, was 'created' in 1985 . . . by an act of the Indiana Legislature adding Section 1.1. . . , to IC 8-22-3 such that any county with a bracketed population of 300,000-400,000 was declared to have aviation governance in the form of a co-terminus Airport Authority possessing sovereign powers. Among them are the statutory powers to legislate, to tax, to bond, to take ground by eminent domain and to overrule local zoning authorities. Allen County is the only county that has . . . satisfied the population criteria. . . . [Pet., p. 3 (emphasis in original).]
>
> The Authority recorded affidavits with the County Recorder claiming to have received title to the airports. . . . [Pet., p. 4.]
>
> . . . [In] February 2003, . . . the [Fort Wayne, Indiana] Journal Gazette published an extensive cover story in the Sunday paper. . . . [Pet., p. 4.]

> . . . SMDfund filed a suit in Allen Circuit Court claiming: 1) unconstitutional 1985 enactment of Section 1.1 of IC 8-22-3 establishment of the Authority. . . . [Pet., p. 4.]
>
> The trial court . . . rul[ed] that the general statute of limitations contained in IC 34-11-1-2(a) bars facial constitutional challenges after ten years. SMDfund gave notice of intention to appeal. The Authority then petitioned the Indiana Supreme Court for . . . transfer. SMDfund agreed . . . and the Court heard oral argument. . . . SMDfund argued that the complaint was a public interest complaint involving a violation of the Indiana Constitution and therefore could not be barred by any time constraint. On 2 August 2005, the Court unanimously affirmed dismissal based on the doctrine of laches. . . . [Pet., p. 5.]

With the exception of the above-quoted material, the Airport Authority objects to the remainder of Petitioner's Statement of the Case as perceived misstatements of both law and fact. As such, Petitioner's statement of the case should be disregarded in its entirety, and the Court should instead rely on Respondent's Statement of the Case.

REASONS FOR DENYING THE PETITION

A. The U.S. Supreme Court Lacks Jurisdiction to Review this Case

Very early in this Court's history, it established that it would not decide a Federal Constitutional issue raised for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In 1809, this Court came to the conclusion that the Judiciary Act of 1789 vested the U.S. Supreme Court with no jurisdiction unless a federal question was raised and decided in the state court below. *Id.* (citing *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809)).

More recently, the Court has held that with very rare exceptions, the Court will not consider a petitioner's federal claim in reviewing a state court judgment under 28 U.S.C.A. § 1257, unless it was either addressed by, or properly presented to, the state court that rendered the decision. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). Powerful policy considerations underlie both the statutory requirement and the Supreme Court Rule that a federal challenge to a state statute or other official act be first presented to the state court. *Webb v. Webb*, 451 U.S. 493, 499 (1981). These policy considerations reinforce the court's unwillingness to entertain cases from state courts when a federal question has not been properly raised below. *Id.*

Principles of comity in the federal system require that state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state law or authority based on federal law or construing and applying the applicable federal requirements. *Id.* In a dual system of government, a federal court should not upset a state court

decision without an opportunity to the state court to correct the Constitutional violation. *Id.* at 500.

Declining jurisdiction when federal questions were not raised below is also reinforced for very practical reasons. *Id.* First, the requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. *Id.* Second, it permits the state court to exercise its authority to construe state statutes so as to avoid or obviate Federal Constitutional challenges. *Id.* Third, the requirement insures that independent and adequate state grounds that obviate the federal issue will be identified and acted upon. *Id.* Finally, presenting federal claims initially to state court ensures that those issues will be adjudicated in the court where necessary to dispose of the case. *Id.* at 501. At a minimum, the record should show with no doubt that a claim under a federal statute or the Federal Constitution was presented in the state court and that the court was apprised of the nature or substance of a federal claim in the time and manner required by state law. *Id.*

The petitioner seeking the writ of certiorari has the burden of showing that the issue was properly presented to the state court. *Adams*, 520 U.S. at 85. When the highest state court is silent on a federal question before this Court, it will assume that the issue was not properly presented below. *Id.* at 86. The aggrieved party bears the burden of defeating the assumption by demonstrating that the state court had a fair opportunity to address the federal question. *Id.* at 87 (quoting *Webb*, 451 U.S. at 501). Petitioner may rebut the assumption by establishing that the federal claim was raised at a time and manner required by state law; by persuading the U.S. Supreme Court that the state procedural requirements could not serve as an independent and adequate state law

ground for the state court's judgment; or demonstrating that the particular federal claim at issue was presented with fair precision in due time. *Id.*

Two cases in particular illustrate the Court's lack of jurisdiction when the federal question is not presented below. In *Adams*, the Alabama Supreme Court affirmed the trial court in approving a settlement agreement of a class action lawsuit that precluded class members from individually suing the defendant for fraud even though all class members did not have the right to exclude themselves from the class or the agreement. The Alabama Court only addressed state law issues, but on petition for writ of certiorari the petitioner argued that the Alabama Supreme Court decision violated the Due Process Clause of the Fourteenth Amendment. The Court in *Adams* found that petitioners failed to carry their burden of showing that their due process claim under the Federal Constitution was properly presented to the Alabama Supreme Court; and therefore, the court dismissed the writ as improvidently granted. *Adams*, 520 U.S. at 90.

In *Cardinale*, the petitioner for writ of certiorari was a criminal defendant who contended that a Louisiana statute that required confessions to be admitted in their entirety was "unconstitutional." Again, because petitioner failed to raise any federal constitutional issue below, the writ was dismissed for lack of jurisdiction. *Cardinale*, 394 U.S. at 439; *see also*, *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929) (dismissing a writ of error and holding that the alleged grounds so lacked in substance as to be frivolous).

Here, petitioner has failed to set forth when a federal question was raised, the method or manner of raising the question, the way in which the state court passed on that

question, or specific portions of the record or summary with references to show that the federal question was timely and properly raised. Upon cursory review of the Record below, it is evident why. None of the plaintiffs, at any time below, ever raised a federal question. No federal question is argued in the Amended Complaint, Plaintiffs' Response to the Motion for Summary Judgment, or in the appeal to the Indiana Supreme Court. At no time prior to his filing of a petition for writ of certiorari did Petitioner raise any federal question.

Even though Petitioner mentions the alleged federal questions presented in his petition here, Petitioner does not develop any argument based on Federal Constitutional law or on a federal statute. Instead, he focuses, as he did below, on the believed improper interpretation of an Indiana statute under the Indiana Constitution and the inapplicability of laches under Indiana common law.

All of the policy considerations underlying the requirement that the federal question be raised below are present in this case. Comity and fairness require that the Indiana Supreme Court should have been afforded the opportunity to respond to Petitioner's attacks on Indiana legislation and the Indiana Constitution if challenged under federal law. The Indiana Supreme Court should have been afforded the opportunity to construe its state's statute and its state Constitution to avoid a Federal Constitutional challenge. Additionally, because the issue before the Indiana Supreme Court was an appeal from summary judgment, the state court would have been the most appropriate forum to raise the federal issues for adjudication or trial. Finally, not only is the record on the federal issue undeveloped, it is completely absent from the record below.

Because no federal issue was raised below, this Court lacks jurisdiction to entertain the Petition for Writ of Certiorari. As such, the Petition should be denied.

B. The Petition is so Procedurally Deficient that Certiorari Should be Denied

The failure of the Petitioner to present with accuracy, brevity and clarity of whatever is essential to ready an adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition for writ of certiorari. S. Ct. R. 14.4. Initially, and as explained above, Petitioner made many misstatements of fact and law in his Statement of the Case and included opinion, argument and conjecture that was not supported by the record. In addition, his petition contains numerous other deficiencies.

Contrary to Rule 14.1(f), Petitioner failed to set forth the constitutional provisions and statutes verbatim with appropriate citations. Next, and contrary to Rule 14.1(g)(i), his Statement of the Case does not contain when the federal question was raised, the method or manner of raising the federal question, or the disposition by the lower court of the federal question. Neither does his Statement of the Case include a quotation to the record or a summary of the federal question. As discussed in Argument Section A, Petitioner could not make such representations regarding when the federal question was raised because no federal question was raised below.

Additionally, and contrary to Rule 29.4(c) and Rule 14.1(e)(v), Petitioner failed to recite in his initial document that 28 U.S.C.A. § 2403(b) may apply, and he did not serve his initial document on the Attorney General of the State of

Indiana. Neither did Petitioner state whether the Indiana Supreme Court certified to the State Attorney General the fact that the constitutionality of a statute of the State of Indiana was drawn into question. The provisions of this Rule are applicable because in his Petition for Writ of Certiorari, Petitioner is questioning the Constitutionality of an Indiana statute under the Federal Constitution.

Perhaps more importantly, Petitioner does not present a clear, concise or cohesive argument for review. The confusing rhetoric presented by Petitioner lacks focus to such a degree that the Court would have to guess at what his arguments are. With few exceptions, the Petitioner's argument section is not supported by citations to legal authority or the Record below. Because of the procedural deficiencies and the lack of a clear argument, even if this Court finds that it has jurisdiction, it should decline to grant certiorari.

CONCLUSION

The case below involved a facial challenge to an Indiana statute as impermissible special legislation under the Indiana Constitution. The Indiana Supreme Court held that the claim was barred under the Indiana common law doctrine of laches. No federal claim or question was ever presented prior to the filing of the Petition for Writ of Certiorari. The Indiana Supreme Court did not have the opportunity to address the federal claims now raised. As such, this Court lacks jurisdiction and should deny the petition for writ of certiorari.

In the event this Court finds a basis for jurisdiction, certiorari should be denied on alternate grounds. Petitioner presents no true federal question, but instead tries to reargue his Indiana state claims here. In addition, Petitioner utterly failed to present the necessary information to this Court in the proper manner, leaving the Court without the means to decide the issues. On any of these grounds, certiorari should be denied.

Respectfully submitted,

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FORT WAYNE – ALLEN COUNTY AIRPORT AUTHORITY, CITY OF FORT WAYNE and ALLEN COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

REPLY BRIEF

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PARTIES TO THE PROCEEDING

The parties in the proceeding are:

Fort Wayne – Allen County Airport Authority, a municipal corporation.

City of Fort Wayne, a municipal corporation.

County of Allen, a municipal corporation.

SMDfund, Inc., Joe Tocci, Chairman and Scott W. Noble, Treasurer, a public interest advocacy for historic Smith Field Airport.

ARGUMENT

While Respondent's restatement of Petitioner's questions attempts to narrow the court's focus to whether seventeen years is sufficient to justify laches, Petitioner has asked whether any time barring statute or doctrine is sufficient to justify dismissal of constitutional challenges at all. The question isn't whether we've lived with repugnancy long enough to excuse it but whether repugnancy can be excused by application of a time bar. We believe it cannot without creating a general exception to explicit protections enumerated in both constitutions. Moreover, the question of clouded title has been disregarded in the state courts as though it was never presented as separable.

The Greatest Generation did not throw itself into utterly destroying tyrannical governments around the world in order to make it safe for tyrannical governments in our own hometowns to cherry-pick our treasures. The most precious of these is the rule of law. Every single civil right is perpetually at risk to political fashion if it is not guaranteed appeal to a higher court sworn to protect them all. By dismissing this case without testing the constitutionality of IC 8-22-3-1.1, the Indiana's Supreme Court has chosen unanimously to subordinate both of our constitutions to the doctrine of laches. The Court's decision has effectively blocked any legitimate constitutional challenge that is more than 17 years unchallenged. Should not laches have also left *Brown v. Board of Education* unreviewed?

We acknowledge only one factual defect in the statement of the case. The Indiana Supreme Court heard oral argument on 20 December 2004 and not on 30 October as

we misstated on page 5 of the petition. If the Court does not dismiss this petition on the law, then Respondent will surely make issue on the facts. When they detect failure there, they will argue ad hominem as they have through their surrogates in the local press. After all, they are fighting for the survival of a non-elected government that has ruled infamously in defiance of the public will for most of their history. We stipulate to the amateur quality of the petition. But the Petitioner does not pretend to be a lawyer nor does the petition presume to be a legal brief on the case. It is an ordinary citizen's claim of fundamental injury to both of his constitutions. We are anxious to argue all the facts and the law, with counsel, in review and at trial in any court to which this Court should so remand. Petitioner is again arguing for hearing the case, not for deciding it.

Indiana's Justices do not sit in a constitutional vacuum. They sit in our constitutional sanctuary. They have sworn to protect both constitutions and cannot be so neutral in the proceedings as to become unconscious to them. The questions we present to the Court are not arcane. They are salient and threaten crude affronts to the integrity of the American judiciary. From its initial filing, this case was brought as a constitutional challenge. Can any constitutionally prohibited legislative act obtain inoculation against judicial reversal by force of another legislative act or by a time-barring doctrine? If so, the Indiana Supreme Court has successfully innovated an irreparable breach of the U.S. Constitution's requirement for American courts to protect their independence from their legislature or to have otherwise blithely encroached upon the people's unalienable rights.

While the Court may certainly deny certiorari without explanation, we pray that this Court views the dismissal of

our questions as more menacing to the U.S. Constitution than granting its writ. Respondent can argue technical perfection in the Petition because their annually replenished $20,000,000 tax-subsidized budget enables them to hire all the lawyers they wish while our remaining $65,000 personal debt renders us incapable of even retaining present counsel, let alone enduring beyond this petition. The practical effect of requiring perfect legal construction of petitions is to perfect exclusion of all petitioners to America's Supreme Court who can't afford lawyers.

We endured this five-year public interest campaign at great cost to our personal estates and have succeeded in saving the Field. But our success is only temporary. Under Indiana law, Respondent need only publicly announce consideration for closure and vote on the question at least 48 hours later – precisely as they did on 26 June 2002. The Indiana high court's refusal to hear this constitutional challenge to this Indiana law ripened the federal issues presented in our petition. Their unanimous adoption of laches establishes a new precedent for using a time bar against all constitutional challenges to the prerogatives of the Legislature. It gives notice to all Americans that a state supreme court can inoculate the institutions of government against constitutional redress by merely refusing to hear the complaint. The Court should grant Certiorari.

Respectfully submitted,

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(4)

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Respondents.

On Petition For Writ Of Certiorari To The United States Supreme Court

PETITION FOR REHEARING

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PARTIES TO THE PROCEEDING

The parties in the proceeding are:

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County of Allen, a municipal corporation.

SMDfund, Inc., Joe Tocci, Chairman and Scott W. Noble, Treasurer, a public interest advocacy for historic Smith Field Airport.

JUSTIFICATION

Petitioner seeks reconsideration by the Court for three reasons.

1) The Court's denial of certiorari occurred after the formal resignation of Justice O'Conner and before the confirmation of newly nominated Justice Alito. We cannot know whether Petitioner earned no votes or just one shy of a grant. Since the composition of the Court has changed after the denial but before the petition for rehearing window has closed, an *'intervening circumstance of a substantial or controlling effect'* of Rule 44.2 may have occurred. And there may now be a different result in a new conference.

Petitioner fully appreciates that the Court experiences membership transitions in the normal course of its duties and that it cannot suspend conference proceedings merely to preempt petitions for rehearing. But Petitioner is compelled by our heritage to approach once again where the rules allow.

2) The original petition may more appropriately have been for a writ of mandamus. Absent a trial, the Court is handicapped, if not unable, to examine the full body of argument that would have been qualified in formal proceedings before having arrived here. For certiorari, the Court is left to sort out what amounts to little more than allegations hurled against the courthouse doors by all parties but which have not been scrubbed of irrelevancies or tested for factuality.

The principals of SMDfund have always felt that this case calls for trial before very public scrutiny but had always deferred to council's preference for summary

judgment. In this last opportunity, we wish to proceed to trial in the local jurisdiction with special instructions,

a) due to the inevitable pressures that descend upon government officials operating in the Airport Authority's jurisdiction over their twenty-year tenure, we doubt that any court within that jurisdiction can rule freely on the questions. We request that this Court remand for a trial in the neighboring county of Whitley, Wells or Adams, b) we think it appropriate that since Allen County leadership brought the facially unconstitutional enabling law that the state legislature adopted in adversity to the City of Fort Wayne, all court costs should be carried by Allen County and/or the state legislature, c) because the facts in this case are encyclopedic but are otherwise not technically arcane, the trial court will benefit from a jury to discern the truth. We request that the selected court empanel a jury for this trial.

3) We wish to simplify the original questions brought before this Court, to wit:

Under the United States Constitution, may a state constitutional challenge be denied a *ruling on the question* by way of time constraints such as statutes of limitation or laches?

ARGUMENT

At every venue where Petitioner has appealed for relief, his government has denied him review on the merits. The evidence, too voluminous to incorporate in a petition, demonstrates that the legislative branches of our state government have habitually violated an explicit

prohibition by the state constitution and denied due process in refusing to move our petition to protect Smith Field with local listing to the Historic Registry. The executives of the county and city governments refused to use their statutory power of appointment to constrain defiant behavior by the special district's un-elected board. Likewise, the legislative councils have refused to use their statutory powers of the purse to constrain the board.

The executive branch's Airport Authority has, since establishment, habitually stonewalled citizen efforts to enable self-funded development of the Field and corrupted the proceedings of the world's most efficient port development mechanism, the FAA's Airport Improvement Program, by using procedural tactics to prevent formal review of a viable competing plan. The state's lower court judiciary reliably inoculated this rogue conduct by adopting every preemptory theory presented.

In the end, the most demoralizing blow to Franklin's experiment in self-government and the people's trust in the rule of law is the Indiana Supreme Court's unanimous medieval stretch for the doctrine of laches as a bar against due process review of the facial unconstitutionality of this Airport Authority's establishment.

Comes now evidence that the Airport Authority has reversed its public sentiments for keeping the Field and returned to the same fraudulent footing it stood upon just before it voted to close and sell the Field in June 2002; non-viability and parasitic loss to big airport resources:

– *these news articles*:

http://www.fortwayne.com/mld/fortwayne/news/local/13652360.htm

http://www.fortwayne.com/mld/journalgazette/13690725.htm

http://www.fortwayne.com/mld/fortwayne/news/local/13698425.htm

Shall the United States Supreme Court perfect these strange rulings by allowing them to prevail? Petitioner is seeking justice in the disposition of a treasure, not in his private interest, but in the public estate. Shall our highest Court also deny him access to judicial review on the merits? We pray that this Court will view the dismissal of our question as corrosive to the republic and grant a writ of mandamus with these special instructions.

Respectfully submitted,

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Pro se

CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay.

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Joseph A. Tocci, Jr.